

Supreme Court, U. S.
E I L E D

SEP 19 1977

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-103

The Leo Foundation,
Petitioner

v.

The State of New Hampshire,
Respondent

**ON PETITION FOR A WRIT OF CERTIORARI
FROM THE SUPREME COURT OF NEW HAMPSHIRE**

BRIEF OF RESPONDENT IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

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On Petition for a Writ of Certiorari
from the Supreme Court of New Hampshire

BRIEF OF RESPONDENT IN OPPOSITION

REPORT OF OPINION BELOW

The decision of the New Hampshire Supreme Court which the Petition for a Writ of Certiorari seeks to review is reported as *Leo Foundation v. State*, ___ N.H. ___, 372 A.2d 1311 (1977).

STATUTE INVOLVED

N.H. Rev. Stat. Ann. Ch. 235 (1964)

ARGUMENT

I. No Substantial Federal Question is Presented

It is well established that "a review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." U.S. Sup. Ct. Rule 19:1; *Durham v. United States*, 401 U.S. 481, 483 (1971). Chief among the factors

which this Court will consider in reviewing a state court decision through certiorari are whether the state court has decided a substantial federal question not previously determined by the Court or whether a state court's decision with respect to a substantial federal question represents a departure from applicable decisions of the Court. U.S. Sup. Ct. Rule 19:1(a). In the instant Petition, none of these circumstances are present.

In the first instance, the Petition does not present a federal question of substance to be determined by this Court. That a citizen of this country cannot be deprived of property without "due process of law" is, as Petitioner suggests, a substantial right. The substantiality of the right, however, has no bearing on the substantiality of the question sought to be certified. The sole issue is whether a substantial federal question is presented by a determination by the highest court of a state that the presence of an employee of the state highway department on a three member highway layout commission does not, as a matter of law, and under the particular circumstances before the court did not, as a matter of fact, constitute such a conflict of interest as to render the decision of the commission void. *Leo Foundation v. State*, ___ N.H. ___, 372 A.2d 1311 (1977).

The cases cited by the Petitioner in support of its Petition are wholly inapposite to the core issue. *Johnson v. Mississippi*, 403 U.S. 212 (1971) and *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) both concern the impartiality of a judge to preside over a contempt proceeding where the alleged contempt had occurred before the same judge. *Bloom v. Illinois*, 391 U.S. 194 (1968) concerns the right to a jury trial for prosecution of a criminal contempt. It is difficult to see how these cases could be used to further, as Petitioner must, the proposition that a substantial federal question is raised by the facts of this case. The petitioner has not demonstrated the existence of any conflict between the decision of the Supreme Court of New Hampshire and one of this Court or any other federal court. Nor has it alleged the existence of a substantial and unsettled federal question that reaches a problem beyond

the academic or episodic. See *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). A decision by the Court in this instance would affect few others than the litigants themselves. *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923).

II. The Decision of the New Hampshire Court Rests on Adequate and Independent State Law Grounds

The existence of an interest, pecuniary or otherwise, that will disqualify an individual from rendering an impartial decision in a matter depends on circumstances and relationships. *American Cyanamid Co. v. Federal Trade Commission*, 363 F.2d 757, 763-64 (6th Cir. 1966); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). In reaching its decision in *Leo Foundation v. State*, ___ N.H. ___, 372 A.2d 1311 (1977), the New Hampshire Supreme Court directly addressed the factual issue which underlies the Petitioner's claim of deprivation of property without due process. It reaffirmed an earlier holding that the appointment of an employee of the highway department to a layout commission was not forbidden under the relevant statute, N.H. Rev. Stat. Ann. Ch. 235. *Papademas v. State*, 108 N.H. 456, 458, 237 A.2d 665, 667 (1968). Moreover, it could find "nothing in the record to indicate that the [highway] department had any interest in whether the public access was constructed or how it should be laid out." *Leo Foundation, supra*, 372 A.2d at 1314. The decision of the New Hampshire Supreme Court is thus rooted in determinations of law and fact that would be dispositive of the matter, irrespective of the due process issue urged by the Petitioner.

CONCLUSION

Because the Petitioner has failed to demonstrate the existence of a substantial federal question arising out of the decision of the Supreme Court of New Hampshire, and because the New Hampshire Supreme Court's decision rests on factual and legal considerations independent of the issue for which review is sought, the Petition for a Writ of Certiorari ought to be denied.

Respectfully submitted,

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James E. Morris
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COUNSEL FOR RESPONDENT

September 16, 1977

I, David H. Souter, Counsel for Respondent and a member of the bar of this Court, do hereby certify that in accordance with Rule 33, three copies of Respondent's Brief in Opposition were served this day by mailing them, first class, postage prepaid, to Arthur H. Nighswander, Counsel for Petitioner, at P.O. Box 189, Laconia, New Hampshire, said address being within 500 miles of the point of mailing.

DAVID H. SOUTER
Attorney General
State of New Hampshire

Concord, New Hampshire
September 16, 1977